U.S. Department of Justice

Immigration and Naturalization Service

H4

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Nebraska Service Center Date: NOV 2 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under § 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(A)(iii)

IN BEHALF OF APPLICANT: [redacted]

Public Copy

prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of [redacted] who was admitted to the United States on December 10, 1984 as a nonimmigrant visitor with authorization to remain until May 30, 1985. On July 3, 1985, the Service denied his request for a change of nonimmigrant status to that of nonimmigrant student. The applicant was granted voluntary departure by August 3, 1985. An Order to Show Cause was issued in his behalf on November 21, 1985 and he was placed in deportation proceedings on November 21, 1985.

On August 10, 1987, he was found deportable, his application for asylum was denied and he was granted voluntary departure until October 10, 1987 in lieu of deportation. He failed to depart. The applicant appealed that decision to the Board of Immigration Appeals which dismissed it on April 14, 1989 as untimely. The applicant moved to reopen his asylum claim on May 22, 1989 and a Warrant of Deportation was issued on July 19, 1989. In July 1990, the applicant requested a deferred departure and work authorization from the local Service office.

On September 11, 1995, the applicant married a United States citizen. On June 3, 1995, the applicant became the beneficiary of an approved petition for alien relative.

On October 17, 1996, the applicant was taken into custody by Service officers. On October 21, 1996, the applicant filed a petition for *writ of habeas corpus* and he was placed on an order of supervision by the Service office in [redacted] The applicant was granted work authorization and was awaiting a travel document to his home country. On October 24, 1996, the applicant's *writ of habeas corpus* was dismissed without prejudice. On March 31, 1997, the applicant again filed a motion to reopen his asylum case and the Service would not join in that motion. On May 22, 1997, an immigration judge denied the applicant's request to reopen as untimely. On May 29, 1998, the Board dismissed his appeal and he did not seek judicial review of that decision.

On August 7, 1998, the applicant requested of Service legal counsel to join in a motion to reopen his deportation proceedings with the Board citing exceptional and compelling circumstances. The applicant alleged that his father's health was failing and he is the sole caretaker. On October 20, 1998, the applicant was taken into custody by Service officers and he filed a complaint for declaratory and injunctive relief and another *writ of habeas corpus* on October 21, 1998. The Service told the applicant that it would not join in his motion to reopen his deportation proceedings. On February 9, 1999, the United States District Court for the Northern District of [redacted] Eastern Division, dismissed the petition for *writ of habeas corpus* for lack of subject matter jurisdiction.

The applicant appealed that decision to the United States Court of Appeals, Sixth District, seeking a stay of deportation pending

appeal. The Court determined on March 22, 1999 that the applicant had not demonstrated that a stay of deportation was warranted and denied the motion. The applicant departed (self-deported from) the United States on April 28, 1999. Therefore, he is inadmissible under § 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(9)(A)(ii). The applicant seeks permission to reapply for admission into the United States under § 212(a)(9)(A)(iii) of the Act, 8 U.S.C. 1182(a)(9)(A)(iii), to rejoin his wife in the United States.

The director determined that the unfavorable factors outweighed the favorable ones and denied the application accordingly.

On appeal, counsel states that the service abused its discretion in denying the application and failed to consider all positive and negative factors in the aggregate. Counsel states that the applicant's child would suffer as the result of the removal of the parent. Counsel refers to a psychological evaluation of the applicant's child on December 21, 1999 at the age of 2 years, 5 months. The psychologist states that the child whose reported history suggests an increase in withdrawal, sadness and anxious behavior over the last several months. The psychologist noted the child's emotional and behavioral functioning are at least part related to difficulties adjusting to his recent separation from his father.

Counsel also notes that the applicant's November 4, 1991 conviction for petty theft at the age of 20 years had been expunged. Counsel states that the Service failed to note that fact in the decision and such failure constitutes an abuse of discretion.

In Matter of Roldan-Santoyo, Interim Decision 3377 (BIA 1999), The Board of Immigration Appeals held that the policy exception in Matter of Manrique, which accorded Federal First Offender treatment to certain drug offenders is superseded by the enactment of § 101(a)(48)(A) of the Act, 8 U.S.C. 1101(a)(48)(A). Under the statutory definition of the term "conviction," no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute. Once an alien is subject to a "conviction" as that term is defined in § 101(a)(48)(A) of the Act, the alien remains convicted for immigration purposes notwithstanding a subsequent state action purporting to erase the original determination of guilt through a rehabilitative procedure. Therefore, the applicant's conviction still constitutes an unfavorable factor.

On appeal, counsel asserts that the applicant has continuously submitted to the supervision and jurisdiction of the Service, his parents are lawful permanent residents and he is married to a U.S. citizen and has a U.S. citizen child. Counsel states that the Service failed to consider the hardship to his child caused by separation. Counsel states that the applicant was legally employed

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with valid work permits during the period he was appealing his immigration status and after his marriage.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-

(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under § 235(b)(1) or at the end of proceedings under § 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) OTHER ALIENS.-Any alien not described in clause (i) who-

(I) has been ordered removed under § 240 of the Act or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) EXCEPTION.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former §§ 242 or 217 of the Act, 8 U.S.C. 1252 or 1187, or ordered excluded under former § 236 of the Act, 8 U.S.C. 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996; A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to

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waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Prior to 1981, an alien who was arrested and deported from the United States was perpetually barred. In 1981 Congress amended former § 212(a)(17) of the Act and eliminated the perpetual debarment and substituted a waiting period.

After reviewing the 1996 IIRIRA amendments to the Act and prior statutes and case law regarding permission to reapply for admission, and after noting that Congress has increased the bar to admissibility from 5 to 10 years, has also added a bar to admissibility for aliens who are unlawfully present in the United States, and has imposed a permanent bar to admission for aliens who have been ordered removed and who subsequently enter or attempt to enter the United States without being lawfully admitted, it is concluded that Congress has placed a high priority on reducing and/or stopping aliens from overstaying their authorized period of stay and/or from being present in the United States without a lawful admission or parole.

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors which offset the fact of deportation or removal at Government expense and any other adverse factors which may exist. Circumstances which are considered by the Service include, but are not limited to: the basis for removal; the recency of removal; the length of residence in the United States; the moral character of the applicant; the alien's respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and to others; and the need for the applicant's services in the United States. Matter of Tin, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws.

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Evidence of serious disregard for law is viewed as an adverse factor. Matter of Lee, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. Matter of Acosta, 14 I&N Dec. 361 (D.D. 1973).

In Matter of Tin, the Regional Commissioner held that such an unlawful presence is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. Following Tin, an equity gained while in an unlawful status can be given only minimal weight.

The court held in Garcia-Lopez v. INS, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992), cert. denied, 507 U.S. 971 (1993).

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as "after-acquired family ties") in Matter of Tijam, Interim Decision 3372 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter was admitted to the United States in 1984 as a nonimmigrant visitor and remained longer than authorized. An Order to Show Cause was issued in his behalf on November 12, 1985 and he was placed in deportation proceedings on November 21, 1985. A Warrant of Deportation was issued in his behalf on July 19, 1989. The applicant married a United States citizen in September 1995 while in deportation proceedings. He now seeks relief based on that after-acquired equity.

The favorable factors in this matter are the applicant's family ties, the approved immigrant visa petition, and the prospect of general hardship to the family.

The unfavorable factors in this matter include the applicant's remaining longer than authorized, his being found deportable, his failure to depart voluntarily, his conviction for committing a crime involving moral turpitude, and his lengthy presence in the United States without a lawful admission or parole. The Commissioner stated in Matter of Lee, supra, that he could only relate a positive factor of residence in the United States where that residence is pursuant to a legal admission or adjustment of

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status as a permanent resident. To reward a person for remaining in the United States in violation of law, would seriously threaten the structure of all laws pertaining to immigration.

It must be noted that the applicant filed an Application for Stay of Deportation (Cancellation of Removal) on April 28, 1999 containing the same arguments and statements that support the appeal; including, the applicant's lesion in his liver, the hardship to his wife and child, the applicant's responsibility to take care of his ailing U.S. citizen father, his wife's symptoms of depression and his attempt to follow the processes and procedures as set out in the Act. The Service reviewed the applicant's record and determined that the negative factors outweighed the positive ones and denied the application accordingly.

The applicant's actions in this matter cannot be condoned. His equity (marriage) gained while being unlawfully present in the United States (and entered into while in deportation proceedings) can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. See Matter of T-S-Y-, 7 I&N Dec. 582 (BIA 1957); Matter of Ducret, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.